FILE COPY

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 29

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY, *Petitioner*,

v.

UNITED TRANSPORTATION UNION, *et al.*, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENTS

CLARENCE M. MULHOLLAND
RICHARD R. LYMAN
741 National Bank Building
Toledo, Ohio 43604

ROBERT HART
15401 Detroit Avenue
Cleveland, Ohio 44107

Attorneys for Respondents

MULHOLLAND, HICKEY & LYMAN
741 National Bank Building
Toledo, Ohio 43604

Of Counsel for Respondents

INDEX

Table of Contents

	Page
Question Presented	2
Statement of the Case	2
Summary of Argument	4
Argument	6
1. The decision below is in accord with the provisions of the Railway Labor Act setting forth the procedures to be followed and the conditions which must be observed in the handling of major disputes over the making or changing of collective bargaining agreements.	8
2. The decision below gives full effect to the intent of the Railway way Labor Act as indicated by its legislative history	11
3. The decision below is supported by decisions of this Court and other federal courts and there is little pertinent authority to the contrary	19
4. The decision below gives effect to the Railway Labor Act's primary purpose of avoiding interruptions to commerce by placing upon management and labor alike conditions to be observed in the voluntary settlement of their disputes	32

Table of Contents-continued

Page

5. The decision below may be sustained as a proper exercise of injunctive power to enforce the duty of good faith bargaining, and of equitable discretion to protect the jurisdiction of a statutory administrative tribunal 35

CONCLUSION 37

Table of Citations

Cases:

Atlantic Coast Line R. Co. v. *Brotherhood of Rail. Train.*, 262 F. Supp. 177, 180-181 25

Baltimore & Ohio R. Co. v. *United Railroad Wkrs., etc.*, 271 F. (2d) 87, 90 (C.A. 2, 1959) 25

Brotherhood of Loc. Eng. v. *B. & O. Co.*, 372 U.S. 284 (1963) 20

Brotherhood of L. E. v. *Missouri-Kansas-T. R. Co.*, 363 U.S. 528 (1960) 36, 37

Brotherhood of Railroad Trainmen v. *Akron & B. B. R. Co.*, 385 F. (2d) 581, 597 (C.A.D.C., 1967), cert. den. 390 U.S. 923 ..... 21, 22

Brotherhood of R. T. v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957) 37

Butte, Anaconda & Pac. Ry. Co. v. *Brotherhood of L. F. & E.*, 168 F. Supp. 911, aff'd. 268 F. (2d) 54 (C. A. 9, 1959) 25

Elgin, Joliet and Eastern R. Co. v. *Burley*, 325 U.S. 711, 725 (1945) 19, 20

Fibreboard Corp. v. NLRB, 379 U. S. 203 (1966) 36

Cases-continued

Page

Florida E. C. Ry. Co. v. *Brotherhood of R. Trainmen*, 336 F. (2d) 172 20

General Committee, B.L.E. v. *Missouri-K.-T. R. Co.*, 320 U.S. 323 (1943) 6

Hilbert v. *Pennsylvania R. Co.*, 290 F. (2d) 881 (C.A. 7, 1961) 29, 30

Illinois Central R. Co. v. *Brotherhood of Locomotive Engineers*, No. 68 C 1382, April 24, 1969, unofficially reported at 71 LRRM 2035 ..... 22, 23, 24

Illinois Central R. Co. v. *Brotherhood of Railroad Train.*, 398 F. (2d) 973 (C.A. 7, 1968) 30

J. I. Case Co. v. *National Lab. Rel. Bd.*, 321 U.S. 332 (1944) 10, 29

Langnes v. *Green*, 282 U.S. 531 (1931) 35

LeTulle v. Scofield, 308 U. S. 415 (1940) 35

Manion v. *Kansas City Terminal Railway Co.*, 353 U.S. 927 (1957) 37

Manning v. *American Airlines, Inc.*, 329 F. (2d) 32, (C.A. 2, 1964) 20, 21

N.L.R.B. v. *Katz*, 369 U.S. 736, 743 (1962) 35, 36

Norfolk & P. B. L. R. Co. v. *Brotherhood of Rail. Train.*, 248 F. (2d) 34 (C.A. 4, 1957) 30

Order of Railroad Conductors v. *Pitney*, 326 U.S. 561 (1946.) 29

Order of R. Telegraphers v. *Railway Exp. Agency*, 321 U.S. 342 (1944) 29

Pennsylvania R. Co. v. *United States Railroad Labor Bd.*, 261 U.S. 72, 79-80 (1923) 6, 7

Cases-continued Page

Pennsylvania R. System v. *Pennsylvania R. Co.*, 267 U.S. 203 (1925) 6

Railroad Telegraphers v. *Chicago & N. W. R. Co.*, 362 U.S. 330 (1960) 33, 34

Railway Employes v. *Florida E. C. R. Co.*, 384 U.S. 238 (1966) 20

Rutland Ry. Corp. v. *Brotherhood of Locomotive Eng.*, 307 F. (2d) 21 (C.A. 2, 1962) 29, 30

Southern Ry. Co. v. Brotherhood of Locomotive Firemen, etc., 337 F. (2d) 127 (C.A.D.C. 1964) 30

Spokane, Portland, & Seattle Ry. Co. v. *Order of Railway C. & B.*, 265 F. Supp. 892, 894 25

Texas & N. O. R. Co. v. *Brotherhood Ry. & S. S. Clerks*, 281 U.S. 548 (1930) 6, 7, 11

United Ind. Wkrs. of Seafarers I. U. v. *Board of Tr. of Galveston Wharves*, 351 F. (2d) 183 (1965), 368 F. (2d) 412 (1966), and 400 F. (2d) 320 (1968), cert. den. May 19, 1969 ..... U.S. ..... 23 L. Ed. (2d) 219 24

Virginian Ry. Co. v. *System Federation No. 40.*, 300 U.S. 515 (1937) 6, 18, 36

Williams v. Jacksonville Terminal Co., 315 U.S. 386 (1942) 26, 27, 28, 29

Statutes:

Railway Labor Act of 1926 (44 Stat. 577) 5, 11

Railway Labor Act, as amended, (45 U.S.C. Sec. 151, et seq.) 6

Railway Labor Act, as amended,

Section 2 First (45 U.S.C. Sec. 152 First) 5, 10

Section 2 Seventh (45 U.S.C. Sec. 152 Seventh) 4, 10, 17, 25

Statutes-continued Page

Section 5 First (b) (45 U.S.C. Sec. 155 First (b))....
2, 4, 8, 9, 10, 19, 26, 32

Section 5 Third (e) (45 U.S.C. Sec. 155 Third (e))....
8, 10, 19, 26, 32

Section 6 (45 U.S.C. Sec. 156).. 2, 3, 4, 5, 8, 9, 10, 17, 25, 26, 29, 30, 31, 32, 33

Section 10 (45 U.S.C. Sec. 160)..... 4, 7, 8, 9, 10, 19, 26, 32

Miscellaneous:

Hearings on H. R. 7180 before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. (1926)..... 12, 13, 16, 17

Hearings on S. 2306 before the Senate Committee on Interstate Commerce, 69th Cong., 1st Sess. (1926) 12, 16, 17

Hearings on H. R. 7650 before the House Committee on Interstate and Foreign Commerce, 73rd Cong., 2nd Sess. (1934)..... 18

Hearings on S. 3266 before the Senate Committee on Interstate Commerce, 73rd Cong., 2nd Sess. (1934)..... 18

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 29

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY, *Petitioner,*

v.

UNITED TRANSPORTATION UNION, *et al.*, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

BRIEF FOR RESPONDENTS

This brief is filed by the United Transportation Union, successor organization to the Brotherhood of Locomotive Firemen and Enginemen which was an original defendant, along with two of its officers for whom the brief is also filed. United Transportation Union was substituted for the Brotherhood of Locomotive Firemen and Enginemen as a party respondent by the Court's order of March 3, 1969. (A. 172.)

QUESTION PRESENTED

May a carrier be enjoined from unilaterally changing the working conditions of its employees prior to exhaustion of the Railway Labor Act's machinery for the handling of major disputes, when the union has served a Section 6 notice for a contract modification which would prohibit the change in question, and the matter is pending before the National Meditation Board following its acceptance of jurisdiction over the dispute?

STATEMENT OF THE CASE

Petitioner's statement of the facts involved is substantially correct and complete except for the few inaccuracies and omissions noted below, and will not be reiterated here.

As noted by petitioner (Br., p. 5), mediation of the Section 6 notice (A. 104, 105) served by the Brotherhood of Locomotive Firemen and Enginemen (BLF&E) in 1961, seeking protective conditions for employees who would be affected by the establishment of new assignments at Trenton, Michigan, was unsuccessful. Following refusal of the parties to submit their dispute to arbitration, the National Mediation Board, on March 4, 1963, terminated its services, at the same time calling the attention of the parties to the requirement of Section 5, First (b) of the Railway Labor Act (45 U.S.C., Sec. 155) that the *status quo* be maintained for another 30 days (A. 138, 139). Thereafter, on April 3, 1963, the Board closed its file, leaving the parties free to resort to self-help (A. 109).

In its letter of February 8, 1963, declining the Board's proffer of arbitration, the Detroit and Toledo Shore Line Railroad (Shore Line) had stated that it was "no longer

contemplating a change in setting up a tie-up point that was used as the basis of the organizations' Section 6 Notice", and that the problem was therefore moot (A. 137).

However, on September 24, 1963, the Shore Line, by bulletin posted on that date, created new assignments requiring the employees to report for work at Dearoad, Michigan, near Detroit, Michigan, eleven miles north of Trenton (A. 7, 110). Shore Line took the position that this was not within the scope of BLF&E's Section 6 notice of April 28, 1961, which had been precipitated by the proposal to establish assignments operating out of Trenton (A. 33). The new assignments created at Dearoad were the first ones which had ever originated at a point other than Lang Yard in Toledo, Ohio (A. 148, 158, 166).

Then, after the BLF&E had unsuccessfully challenged the Dearoad assignments before a Special Board of Adjustment as a violation of the written collective bargaining agreement, Shore Line "revived its plan to establish such assignments at Trenton" (Pet. Br., p. 6). This precipitated the BLF&E's Section 6 notice which is directly involved here, that of January 27, 1966. Shore Line's attempt to put the new assignments at Trenton into effect without completion of the handling of this notice under the machinery of the Railway Labor Act gave rise to this litigation.

Shore Line took the position in the District Court that BLF&E's proper remedy was to submit its dispute to the National Railroad Adjustment Board, and that a minor dispute was involved (A. 7-8). The District Court rejected this contention (A. 150) and it was not urged by Shore Line on appeal. In addition Shore Line unsuccessfully urged in both courts below that the provisions of the Railway Labor Act did not apply because the dispute growing

out of the BLF&E's Section 6 notice of January 27, 1966, concerned a "non-bargainable" matter within the realm of "managerial discretion" (A. 145, 161, 168-169). Neither of these arguments has been urged in the petition for certiorari or Shore Line's brief on the merits, and we understand that under Rule 23 (1) (c) of this Court they may not be further pressed.

SUMMARY OF ARGUMENT

1. The provisions of the Railway Labor Act for the handling of major disputes evidence the heavy reliance placed by Congress upon mediation and the implementation of the Act's voluntary procedures by "cooling off" periods during which the *status quo* was to be maintained by all parties, to avoid strikes and interruptions to commerce. By the plain wording of the statute, the prohibitions against changes in the *status quo* become operative when either party serves notice under Section 6 of proposed contract changes. Under the express language of the Act the changes specifically prohibited, after a Section 6 notice has been served, are those in "rates of pay, rules or working conditions" (Section 6); "rates of pay, rules or working conditions or established practices in effect prior to the time the dispute arose" (Section 5 First (b)); and "the conditions out of which the dispute arose" (Section 10).

Nowhere in the Act is there any indication that the foregoing *status quo* requirements are to be so narrowly construed as to include only those changes already restricted by existing agreements. Section 2 Seventh, relied on by the Shore Line, does not purport to define the *status quo* which must be observed during the handling of a major dispute. It appears in the section of the Act creating the duty to bargain collectively and to "make and maintain

agreements." (Section 2 First), and simply provides that if a carrier wishes to change rates of pay, rules or working conditions which it has already agreed to, it may do so only in the manner provided in the existing agreement or by resort to the Section 6 notice procedure.

2. The legislative history of the statute compels the conclusion that Congress intended and understood that the duty to maintain the *status quo* was not limited to the mere observance of existing contractual obligations. Testimony of witnesses for the proposed legislation clearly indicated that the prohibition of changes in the *status quo* during the processing of major disputes was to have a broad rather than a narrow interpretation. The Railway Labor Act of 1926, which first adopted the provisions here involved, was sponsored by management and labor jointly, and represented compromises on both sides. It was understood that the maintenance of the *status quo* during the cooling off periods, for the protection of the public, was a price that both were willing to pay for the right to bargain collectively on a voluntary basis, without being subjected to compulsory arbitration in the negotiation of their labor agreements.

3. Decisions of this Court and other federal courts have recognized both the existence of the requirement to maintain the *status quo* during the handling of major disputes, and its applicability to railroads as well as their employees. Enforcement of this duty by injunctive process has been recognized as proper. The scope of the *status quo* which must be preserved has not been limited to provisions of existing agreements, especially with respect to those matters which are being bargained about and mediated pursuant to a Section 6 notice. There is no substantial body of pertinent authority to the contrary.

4. The decision below gives effect to the Railway Labor Act's primary purpose of avoiding interruptions to commerce in the railroad industry. It does not operate to destroy existing rights, but recognizes that management and labor alike are subject to certain mandatory requirements for the orderly settlement of their disputes before they may act unilaterally, upon the expiration of the statutory "cooling off" periods. A contrary result, permitting a carrier to put into effect changes in working conditions which the union is seeking to prohibit or restrict, while at the same time requiring the union to stay its hand for the statutory period, would make collective bargaining a sham and reduce to a mere formality the major disputes machinery of the Act.

5. The decision below may be sustained as a proper exercise of injunctive power to enforce the duty of good faith bargaining under the Railway Labor Act, and of equitable discretion to protect the jurisdiction of a statutory administrative tribunal.

ARGUMENT

In the railroad industry, labor-management relations have long been conducted pursuant to a statutory system of voluntary collective bargaining. In enacting the Railway Labor Act (45 U.S.C., Sec. 151 et seq.), Congress placed heavy reliance on negotiation and conference, conciliation, and voluntary arbitration (*General Committee, B.L.E.* v. *Missouri-K.-T. R. Co.*, 320 U.S. 323 (1943)).[1/] The only deci-

---

1/ See also *Pennsylvania R. Co.* v. *United States Railroad Labor Bd.*, 261 U.S. 72, 79-80 (1923), *Pennsylvania R. System* v. *Pennsylvania R. Co.*, 267 U.S. 203 (1925), *Texas & N.O. R. Co.* v. *Brotherhood Ry. & S.S. Clerks*, 281 U.S. 548 (1930), and *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515 (1937).

sional process entering into the resolution of major disputes over the making or changing of labor agreements was the finding of facts by an Emergency Board under Section 10 of the Act (45 U.S.C., Sec. 160), but such findings were enforceable only insofar as they might bring public opinion to bear upon the disputants. (See *Pennsylvania R. Co.* v. *United States Railroad Labor Bd.*, 261 U.S. 72, 79-80 (1923).)

In order to protect the public from interruptions to commerce, however, Congress placed upon the parties to these disputes the duty to maintain the *status quo* during "cooling off" periods while pursuing these voluntary processes. (*Texas & N. O. R. Co.* v. *Brotherhood Ry. & S. S. Clerks*, 281 U.S. 548, 565-566.) But although the statute imposes this restraint upon both labor and management, petitioner Shore Line here urges that while its employees represented by BLF&E were bound to refrain from any resort to self-help while pursuing the major disputes machinery to a conclusion, the Shore Line had the right to make desired changes in their working conditions, by unilateral action with respect to the very subject matter of the dispute, unhampered by any waiting periods or obligation to maintain the *status quo* existing when the dispute arose.

Shore Line bases this conclusion on the argument that insofar as carriers are concerned, the Act's *status quo* requirements only encompass those rates of pay, rules, or working conditions which are already embodied in an existing agreement. In other words, it contends that the only *status quo* which the statute requires it to maintain is that to which it has already bound itself contractually.

What is contended by the Shore Line in this case would make a mockery of the *status quo* requirements of the Act which were imposed upon both parties to railroad labor disputes, for the protection of the public, as conditions of the voluntary collective bargaining permitted by the statute. And it would make a sham of the bargaining process itself, permitting carriers to achieve their objectives unilaterally and immediately, while requiring employees to pursue mechanically the major disputes procedures of the Act before being in a position effectively to oppose or restrict changes in working conditions which were already an accomplished fact.

1. The decision below is in accord with the provisions of the Railway Labor Act setting forth the procedures to be followed and the conditions which must be observed in the handling of major disputes over the making or changing of collective bargaining agreements.

The decision below applied the Railway Labor Act's *status quo* requirements in accordance with the clear and unambiguous language in which they are set forth. These requirements appear in Section 5, dealing with the mediation and conciliation functions and duties of the National Mediation Board; in Section 6, stating the procedure to be followed, including reference to the Mediation Board for handling under Section 5, in the processing of major disputes; and in Section 10, providing for the creation of Presidential Emergency Boards when mediation of important disputes has failed.

In none of these sections is the *status quo* which must be preserved defined as consisting simply of the current obligations of existing contracts. On the contrary, the language employed compels the conclusion that no such narrow restriction was contemplated. Thus in Section 5 First (b) it is specified that when mediation has failed and arbitration has been declined, "for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, *no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.*" (45 U.S.C., Sec. 155 First (b).) Section 6 provides that when notice of an intended change in agreements has been given, and during conferences or mediation, "*rates of pay, rules or working conditions shall not be altered by the carrier*" until proceedings under Section 5 have been completed, or conferences between the parties have been terminated for ten days without recourse to the Mediation Board. (45 U.S.C. Sec. 156.) And Section 10 states that in the event a dispute reaches the stage of handling before a Presidential Emergency Board, "After the creation of such board and for thirty days after such board has made its report to the President, *no change, except by agreement, shall be made by the parties in the conditions out of which the dispute arose.*" (45 U.S.C., Sec. 160) (Emphasis supplied throughout.)

The wording of the quoted portions of the statute, in which Congress expressed the *status quo* requirements by which is sought to prevent interruptions to commerce during the pendency of major disputes, clearly refutes the Shore Line's contention that the *status quo* consists only of

existing contract rights. Had such been the intent, it would have been expressed in simpler, more appropriate language.

The provisions of the statute quoted above are the only ones which describe or set forth the *status quo* which the parties must preserve during the processing of a major dispute.

The statutory language which the Shore Line contends (Br., pp. 29-31) must be read into these provisions, to limit their scope to working conditions "embodied in agreements", e.i.: that contained in Section 2 Seventh, and in the introductory sentence of Section 6, does not purport to set forth any *status quo* duties attendant upon major disputes procedures. It simply states when those procedures must be invoked, and lays down the requirement that contracts may be changed only by the statutory procedures. [2/] The *status quo* provisions of Sections 5, 6, and 10 which we have quoted specify the conditions to be observed by the parties *after* the statutory machinery has been resorted to, and *while* it is in progress.

Finally, Shore Line's argument that the intent of the statutory language was that the phrase "rates of pay, rules or working conditions" was meant to be synonomous with the word "agreements" is completely untenable in the light of Section 5 Third (e) of the Act (45 U.S.C. Sec. 155 Third

---

2/ Section 2 Seventh also operates to attach legal and binding effect to the collective labor agreements which Section 2 First of the Act required the parties to "make and maintain", and to prevent their unilateral change or abrogation by carriers. The status of such agreements as valid, enforceable contracts is a matter as to which there was considerable doubt at the time of enactment of the Railway Labor Act. See *J. I. Case Co.* v. *National Lab. Rel. Bd.*, 321 U.S. 332 (1944), and annotation at 88 L. Ed. 770, 772-773.

(e)), requiring carriers to file with the Mediation Board copies of contracts covering rates of pay, rules, and working conditions, and also statements of rates of pay, rules and working conditions *not covered by contract.*

2. The decision below gives full effect to the intent of the Railway Labor Act as indicated by its legislative history.

The statutory provisions for the handling of major disputes with which we are here concerned, prescribing "cooling off" periods during which the *status quo* was to be maintained, first appeared in the Railway Labor Act of 1926 (44 Stat. 577). The legislative history of that Act clearly reveals the concern of Congress over the possible adverse effects upon the public and interruptions to commerce arising out of a system allowing rates of pay, rules and working conditions to be arrived at by the free interplay of voluntary collective bargaining between management and labor, rather than by compulsory arbitration or binding decision by a government agency.

The 1926 Act was a unique piece of legislation, in that it was prepared and presented to Congress jointly by railroad management and labor. (*Texas & N. O. R. Co.* v. *Brotherhood Ry. & S. S. Clerks,* 281 U.S. 548, 563, and note 2 (1930).) The *status quo* provisions here involved were included in the bill thus jointly presented, and were accepted by Congress as a measure designed to protect the public against interruptions to commerce. See *Texas & N. O. R. Co.* v. *Brotherhood R. & S. S. Clerks,* supra, at p. 565-566, and note 2 quoting Congressional Committee reports on this phase of the legislation.

Throughout the hearings on the 1926 Act before the House and Senate committees there was extensive testimony as to the scope and purpose of the *status quo* requirements, and this testimony clearly refutes Shore Line's contention that they must be interpreted narrowly, and that the prescribed cooling off periods were only meant to forestall changes prohibited by existing agreements. As Donald Richberg, spokesman for the labor proponents of the bill, stated before the Senate Committee on Interstate Commerce: [3/]

> "... What broader phrase could be used than 'conditions out of which the dispute arose' which comprehends all the elements affecting the controversy? It is intended to make it clear that the parties are going to wait and give the Government full opportunity to adjust the controversy." (1926 *Senate Hearings*, pp. 88-89.)

And Mr. Richberg testified in similar vein before the House Committee on Interstate and Foreign Commerce, [4/] saying:

> "The thought was to include in the broadest way all the factors which contributed to what is commonly called the status quo ..."

[3/] *Hearings on S.* 2306 *before the Senate Committee on Interstate Commerce,* 69th Cong., 1st Sess. (1926), hereinafter referred to as the 1926 *Senate Hearings.*

[4/] *Hearings on H. R.* 7180 *before the House Committee on Interstate and Foreign Commerce,* 69th Cong., 1st Sess. (1926), hereinafter referred to as 1926 *House Hearings.*

. . . .

"... the purpose is to preserve unchanged all the conditions involved in the controversy until there is full opportunity for a presidential investigation and a 30-day report. In other words a full cooling time and opportunity to crystallize public opinion." (1926 *House Hearings*, p. 44.)

Further elaborating on the scope of the *status quo* to be observed, Mr. Richberg testified as follows:

"MR. HOCH. Yes. Now I do not understand and I am not yet entirely satisfied as to the force of those words 'in the conditions out of which the dispute arose.' In answering Mr. Fredericks you used this language, as I recall it: 'Conditions involved in the controversy.' Now I can understand that. That seemed to me to express what is in mind here. But to say, 'the controversy in the conditions out of which the dispute arose' seemed to me still not to be clear.

"Mr. RICHBERG. Let me express the situation this way: It was the desire of those who attempted to work out an agreement on this to have a phrase here which would be broad enough so that in the ordinary interpretation of language in its natural meaning it would be well understood what was intended. It was not the desire of either party to write in at

this section of the bill something that had not been written in anywhere else, and that was an absolute prohibition and a compulsion against one party alone of the bill.

The question was raised as to strikes. This is not a one-sided affair. The conditions out of which a dispute arose are subject to change, not merely by a strike of employees. They are subject to most vital change by their subtle actions on the part of management which it is almost impossible to reach by any prohibition of law. Now, it is very easy, as far as language goes, to say men shall not strike. But it is practically impossible, so far as language goes, to write a specific prohibition upon what the employer shall not do at the same time, and in that situation it seemed that the public interest could be best met by using a phrase which was broad enough to make it perfectly clear what the intentions of the parties were, and at the same time that was not language written for the purpose of hitting one party over the head with a club. Now, we do not want to hit either party over the head with a club, but if there is going to be any club swinging we want it swung equally on both sides.

Now this phrase 'in the conditions out of which the dispute arose.' Let us consider

that for a moment in its judicial interpretation. What are the conditions out of which the dispute arose? The A. B. Railroad is employing so many hundred men, who have applied for an increase of wages, we will say, or the A. B. Railroad has notified so many hundred men that there will be a decrease of wages on a certain day. Negotiations have gone on between the parties, and meanwhile the men have continued to work and the employer has continued to pay them the wages which it was paying. They have not been able to reach an agreement. Now, if the conditions out of which the controversy arose are to be preserved it is perfectly clear that the men must continue in the employment which they are engaged in, or otherwise they are changed from that condition. Then they were employed. The railroad must pay the wages which it was paying, otherwise that condition is changed. The rules which apply to the operations of the men, which could be changed very easily by the railroad, and might change the effect of the wage payments, might change the conditions under which the men were working, those must remain, because they are the conditions that existed when the controversy arose. The kind of service which the men are giving. These are all part of the conditions out of which the controversy arose. Now, you can not take

> a specific act which might interfere with or interrupt the transportation which would not amount to a change in the conditions out of which the dispute arose, because transportation was going on when the dispute arose. You would certainly change the conditions if you changed the situation so that the transportation is interrupted. And that is the general purpose you desire to preserve." (1926 *House Hearings*, pp. 55-56.)

Additional elaboration of the foregoing line of testimony by Mr. Richberg is embodied in his remarks at pages 90-94, and 276-277, of the 1926 *House Hearings*.

Throughout the hearings on the 1926 Act there was no dissent by management witnesses from Mr. Richberg's explanation of the scope and purport of the *status quo* provisions contained in the proposed legislation. Indeed, complete agreement between labor and management as to the intent of the proposals was a key feature of the presentation to Congress of the 1926 Act. As stated by A. P. Thom, principle spokesman for the carriers:

> "This is a scheme presented here by both parties in good faith as a method of preventing the interruption of transportation. Neither party can afford to have interruption of transportation without resorting to every provision of this bill first . . . . " (1926 *Senate Hearings*, p. 29.)

See also additional testimony of Mr. Thom at pages 14, 30-31, and 94 of the 1926 *Senate Hearings*, and pages 113-115 and 144 of the 1926 *House Hearings*.

The committee hearings on the 1926 Act produced much discussion of the *status quo* features of the proposed legislation in addition to the very pertinent testimony referred to above. [5/] Yet in its discussion (Br., pp. 32-38) of the legislative history of the 1926 Act the Shore Line does not refer to the testimony dealing with the *status quo* provisions here involved, but rather that which related to the importance of having management-labor relations governed by agreement, and of requiring advance notice of the termination of such agreements. This testimony is not at all germane to the principle issue here involved, the scope of the Act's requirements with respect to maintenance of the *status quo* during the processing of major disputes. The thrust of that testimony, rather, was to emphasize the position of both the management and labor proponents of the 1926 Act that voluntary collective bargaining was preferable to compulsory arbitration, and of vital importance to successful labor relations.

Again in referring to the legislative history of the 1934 amendments to the Act (Br., pp. 39-40), Shore Line discusses only matters relating to portions of the Act other than those imposing the *status quo* requirements here in issue. As noted in the first portion of our argument dealing with the language of the statute, neither Section 2 Seventh, nor the introductory sentence of Section 6, purports to set forth any *status quo* duties.

5/ See 1926 *Senate Hearings*, pp. 58- 59, 65, 71, and 105; and 1926 *House Hearings*, pp. 18, 100, 197, 200-201, 211, 250-252, 295-296, and 344.

The 1934 amendments were not concerned with the machinery for handling major disputes over the making and changing of agreements, but rather primarily with reinforcing the right of employees to bargain collectively through representatives of their own choosing. (*Virginian Ry. Co.* v. *System Federation No.* 40, 300 U.S. 515 (1937)), and with the creation of the National Railroad Adjustment Board for the final and binding disposition of minor disputes over the interpretation and application of agreements. The only change in the machinery for handling major disputes was the elimination of a possible loophole in the 1926 Act, to insure continued maintenance of the *status quo* during the period between rejection of the Mediation Board's final proffer of arbitration under Section 5, and the appointment of a Presidential Emergency Board. (*Hearings on H. R.* 7650 *before the House Committee on Interstate and Foreign Commerce*, 73rd Cong., 2nd Sess. (1934), hereinafter referred to as 1934 *House Hearings*, p. 50; *Hearings on S.* 3266 *before the Senate Committee on Interstate Commerce*, 73rd Cong., 2nd Sess. (1934), hereinafter referred to as 1934 *Senate Hearings*, p. 21.) [6]

Aside from the fact that the 1934 amendments referred to by Shore Line do not involve the major disputes machinery of the Act or change the language with which

---

6/ Except for this change, there was general satisfaction with the major disputes machinery of the 1926 Act. Joseph B. Eastman, Federal Coordinator of Transportation, testified, with respect to the proposed 1934 amendments, that "The present machinery for mediation and possible arbitration and for the final appointment of a fact-finding board are left largely unchanged." (1934 *House Hearings*, p. 50.) M. W. Clement, representing all class I railroads in the United States, said that "The Railway Labor Act of 1926, with certain modifications, is nearly a perfect bill . . . . " (1934 *House Hearings*, p. 139.)

the *status quo* obligations are described and imposed, the fact is that the 1934 legislative history is devoid of any consideration or discussion of the *status quo* requirements except with respect to the amendment of Section 5, noted above, to assure their continuity between Mediation Board and Emergency Board handling. In view of the importance attached to these requirements in 1926, it is inconceivable that without any consideration or discussion, and in the face of general satisfaction with the existing major disputes machinery, Congress would have tampered with them in 1934. And it is impossible to believe that it would have attempted the narrow delineation of the scope of the *status quo* for which Shore Line contends, and still have described it, in Sections 5 and 10 of the Act, in such terms as "established practices in effect prior to the time the dispute arose", and "the conditions out of which the dispute arose."

3. The decision below is supported by decisions of this Court and other federal courts and there is little pertinent authority to the contrary.

The courts have long recognized the obligations imposed by the Railway Labor Act for the maintenance of the *status quo* until the statutory procedures for the handling of major disputes are exhausted. Thus in *Elgin, Joliet and Eastern R. Co.* v. *Burley*, 325 U.S. 711, 725, this Court said:

> "... The parties are required to submit to the successive procedures designed to induce agreement. Sec. 5 First (b). But compulsions go only to insure that *those*

> *procedures are exhausted before resort can be had to self-help.*" (Emphasis supplied.)

That the mandatory duty to bargain collectively in accordance with the procedures of the Railway Labor Act is equally applicable to carriers and their employees is further pointed up by footnotes 12, 18, and 26 to the opinion in the *E., J. & E.* case. (325 U.S. 711, at pp. 721, 725, and 730.)

Other decisions of this Court and other federal courts have recognized both the existence of the requirement to maintain the *status quo* during the handling of major disputes, and its applicability to railroads as well as their employees. One of the most recent decisions in point is that in *Brotherhood of Loc. Eng.* v. *B. & O. Co.*, 372 U.S. 284 (1963), where the court quoted its previous language (above) from the *E., J. & E* case, and reaffirmed the proposition that the question of whether the major disputes handling procedures had been exhausted was determative of a carrier's right to proceed with changes in the *status quo*. The principle was reiterated in *Railway Employes* v. *Florida E. C. R. Co.*, 384 U.S. 238 (1966). See also the decision of the Court of Appeals for the Fifth Circuit in the same litigation, reported as *Florida E. C. Ry. Co.* v. *Brotherhood of R. Trainmen*, 336 F. (2d) 172, and cases cited.

Additional cases have recognized the principle. Thus, in *Manning* v. *American Airlines, Inc.*, 329 F. (2d) 32, (C.A. 2. 1964). the court said:

"The propriety of an injunction to enforce the then unique provisions of the Railway Labor Act for maintaining the *status quo* while the parties to a labor dispute pursue various stages of negotiation, mediation, or arbitration, was established long ago. Texas & N. O. R. R. v. Brotherhood of Ry. Clerks, 281 U.S. 548, 565-566, 50 S. Ct. 88, 74 L. Ed. 608 (1930). Although the Texas & N. O. decision antedated the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, the debates on that Act, 75 Cong. Rec. 5503-04 (1932), made clear that it was not intended to apply to injunctions of this nature. See Railroad Yardsmasters v. Pennsylvania R. R., 224 F. 2d. 226 (3 Cir. 1955); Chicago, R. I. & P. R. R. v. Switchmen's Union, 292 F. 2d 61, 63-64, 66 (2 Cir. 1961), Cert. denied, 370 U.S. 936, 82 S. Ct. 1578, 8 L. Ed. 2d 806 (1962)."

And, in concluding its opinion, the court remarked:

"The purpose of Section 6 was to prevent rocking of the boat by either side until the procedures of the Railway Labor Act were exhausted . . . . "

Similarly, in *Brotherhood of Railroad Trainmen* v. *Akron & B. B. R. Co.*, 385 F. (2d) 581, 597 (C.A.D.C., 1967), cert. den. 390 U.S. 923, the court observed:

" . . . If we turn from speculation about legislative intent to the realities of the

> Railway Labor Act, we are aware that the conferences triggered by Section 6 notices are typically the beginning and not the end of the statutory procedures. If conferences proposed by a Section 6 notice are unavailing either party can invoke the services of the National Mediation Board. *While negotiations continue or the Board has jurisdiction, no self-help is permitted.* The parties are free to submit their controversy to arbitration. If none of these techniques resolves the matter, the President may convene an emergency board to investigate the dispute and report back on the issues. *Only when all these steps have been exhausted are the parties free to act unilaterally.*" (Emphasis supplied.)

Another very recent decision squarely in point on the issues here involved is that of the Northern District of Illinois in *Illinois Central R. Co.* v. *Brotherhood of Locomotive Engineers*, No 68C1382, April 24, 1969, unofficially reported at 71 LRRM 2035. [7/] The following language from the court's opinion is most pertinent here:

> "The Court has observed that in Section 2 Seventh the prohibition is against a change by the carrier of 'working conditions . . . as embodied in agreements'. The final determination of

---

7/ Labor Relations Reference Manual, a publication of the Bureau of National Affairs, Washington, D.C.

whether such a change has occurred is a question for the National Railroad Adjustment Board.

"But once a Section 6 notice has been served the prohibition is against a change by the carrier of 'working conditions' until the Mediation Board gives written notice of the failure of its efforts, and for thirty days thereafter (unless procedures of arbitration or of an emergency board are under way) ' . . . . no change shall be made in . . . working conditions or established practices in effect prior to the time the dispute arose.' " (71 LRRM, p. 2038.)

"The status quo language contained in Section 5 and in Section 10 of the Act appears to follow the general understanding of status quo — the last actual, peaceable, non-contested condition of the parties (see Words and Phrases, Permanent Edition, Vol. 40., Page 133).

"The Court therefore interprets the status quo provisions of Section 6 of the Railway Labor Act in its use of the phrase 'working conditions' to include 'established practices in effect prior to the time the dispute arose,' as found in Section 5, and 'conditions out of which the dispute arose,' as found in Section 10.

"The Court, in passing on a request for an injunction against a strike, has juris-

> diction to determine what were the working conditions, established practices in effect prior to the time the dispute arose, and conditions out of which the dispute arose. The exercise of such jurisdiction does not conflict with the exclusive jurisdiction of the National Railroad Adjustment Board to determine 'disputes . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions (45 USC 153 First (i)).'
>
> "The Court concludes that neither the Illinois Central nor the Brotherhood may change 'working conditions' until the National Mediation Board has finally acted upon the dispute stated in the Section 6 notice of June 3, 1968, and that 'working conditions' includes 'established practices in effect prior to the time the dispute arose' and 'conditions out of which the dispute arose.'"

Another case supporting the decision below is that involved in the three successive decisions by the Court of Appeals for the Fifth Circuit, *United Ind. Wkrs. of Seafarers I. U.* v. *Board of Tr. of Galveston Wharves*, 351 F. (2d) 183 (1965), 368 F. (2d) 412 (1966), and 400 F. (2d) 320 (1968), cert. den. May 19, 1969, ... U.S. ....., 23 L. Ed. (2d) 219, discussed in the brief of the *amicus curiae*, Railway Labor Executives' Association, at pp. 12-14. There the court not only enforced the carrier's obligation to

maintain the *status quo* pending exhaustion of the Act's major disputes machinery, but fashioned relief to restore the *status quo* when the change in working conditions had actually been consummated by the carrier.

Additional cases which support the decision of the court below, requiring plaintiff to maintain the *status quo*, are *Atlantic Coast Line R. Co.* v. *Brotherhood of Rail. Train.*, 262 F. Supp. 177, 180-181; *Spokane, Portland & Seattle Ry. Co.* v. *Order of Railway C. & B.*, 265 F. Supp. 892, 894; *Butte, Anaconda & Pac. Ry. Co.* v. *Brotherhood* of L. F. & E., 168 F. Supp. 911, aff'd. 268 F. (2d) 54 (C.A. 9, 1959); and *Baltimore & Ohio R. Co.* v. *United Railroad Wkrs.*, etc., 271 F. (2d) 87, 90 (C.A. 2, 1959).

In spite of the repeated decisions holding the *status quo* requirements of the Act to be equally binding on both parties, carriers as well as employees, Shore Line argues that Section 2 Seventh only requires it to resort to the agreement-changing procedures of Section 6 when the current agreement would not permit it to make a contemplated operating change. The absence of such a Section 2 Seventh prohibition, of course, would not mean that a unilateral change in working conditions such as that here involved would not violate any other obligations of the carrier under the Act, such as the general duty of good faith collective bargaining. But in any event it does not follow that the *status quo* requirements have no application when Section 6 is invoked by the employees. That BLF&E served a Section 6 notice, dealing with the precise subject matter of the change in working conditions which Shore Line claims it could effect unilaterally, and that the National Mediation Board accepted jurisdiction of the dispute, is not in question. The *status quo* requirements of the machinery

of Sections 6, 5, and 10 thus set in motion are explicit, and not limited to the terms of existing contracts.

Here as in the court below, Shore Line relies heavily on the case of *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (1942). The facts and issues in that case are not remotely analagous to those presented here. There was no existing collective bargaining agreement in effect, nor any prior history of bargaining; *the National Mediation Board had not taken jurisdiction; there was not even any pending demand for an agreement on the subject matter of the change put into effect by the carrier;* and the case dealt primarily with statutory minimum wage requirements of the then newly enacted Fair Labor Standards Act.

The *Williams* litigation was a consolidation of two cases, the second being known as the *Pickett* case and involving the Dallas Terminal. The Fair Labor Standards Act became effective October 24, 1938. On October 11, 1938, the red caps at the Dallas Terminal notified the latter that the red caps had selected the Brotherhood of Railway and Steamship Clerks to be their representative and that the Clerks' general chairman was a man named Pickett. The latter promptly notified management that he desired a conference for the purpose of negotiating a collective agreement. On October 22, 1938, the management delivered to each red cap a letter informing him that he must report weekly the amount of tips received, and that the management would pay such additional sums weekly to each red cap as would guarantee to the red cap the minimum wage required by the Act. On October 24, 1938, Pickett protested the carrier's letter. Nevertheless, the red caps continued to work and comply with the management's letter of October 22, 1938.

On December 26, 1938, Pickett submitted to the Dallas terminal a proposed general agreement covering hours of service and working conditions, *but not the subject of wages.* On December 6, 1939, the terminal informed Pickett that the problem created by the tips was in litigation, and when the matter was settled it would reach an agreement with the Clerks. On January 1, 1940, a collective agreement was signed, *omitting the subject of wages.* Later a suit was brought by Pickett against the terminal to recover wages due the red caps under the Fair Labor Standards Act.

The plaintiff contended that the terminal could not lawfully impose upon the red caps the conditions set forth in its letter of October 22, 1938, because to do so violated the Railway Labor Act. The argument relied on was that since the Brotherhood requested the Dallas Terminal on October 11, 1938, to negotiate a collective agreement, the terminal could not thereafter lawfully impose upon the individual red caps the conditions set forth in the terminal's October 22, 1938, letter. This Court rejected that contention. It held that when the red caps continued to work after receiving the October 22, 1938, letter with its conditions, an individual contract between each red cap and the terminal resulted as a matter of law. The Court concluded that the Railway Labor Act did not prevent that result, on the following reasoning:

> " . . . This employment of the red caps was at will and subject to the employer's conclusions as to the desirability of continuing their employment . . . . " (315 U.S. p. 397.)

> "With the effective date of the Act the employers became bound to pay a minimum wage to their employees, the red caps. Accordingly the latter were notified that future earnings from tips must be accounted for and considered as wages. Although continuously protesting the authority of the railroads to take over the tips, the red caps remained at work subject to the requirement . . . . *By continuing to work a new contract was created . . . .*" (315 U.S. p. 398; emphasis supplied.)

> " . . . Independent individual contracts are not affected by the [Railway Labor] Act . . . . " (315 U.S., p. 399.)

After concluding that the bargaining provisions of the Railway Labor Act were limited to collective action, the Court said:

> " . . . Because the carrier was, by the act, placed under the duty to exert every effort to make collective agreements, it does not follow that pending those negotiations, where no collective bargaining agreements are or have been in effect, the carrier cannot exercise its authority to arrange its business relations with its employees in the manner shown in this record. As we have stated in discussing the Jacksonville case, the Railway Labor Act dealt with collective bargaining agreements only and not with the employment

> of individuals. This conclusion is pertinent in considering the effect of the Dallas request for collective bargaining." (315 U.S., p. 402.)

This rationale of the *Williams* decision would appear to be of doubtful validity in the light of the companion decisions of this Court, two years later, in *J. I. Case Co.* v. *National Lab. Rel. Bd.*, 321 U.S. 332 (1944) and *Order of R. Telegraphers* v. *Railway Exp. Agency*, 321 U.S. 342 (1944), holding invalid individual employment contracts negotiated in the face of the duty to bargain collectively.

The other decision of this Court cited by petitioner as contrary to the decision below, *Order of Railroad Conductors* v. *Pitney*, 326 U.S. 561 (1946), did not involve the question of a carrier's right to make unilateral changes during negotiations or mediation pursuant to a union's Section 6 notice, but rather the question of whether existing agreements controlled the subject matter of the changes, so that the *carrier* could not put them into effect without seeking amendment of the existing agreements pursuant to Section 6. As we have noted above, the decision below does not hold that absent a pending major dispute being progressed in accordance with the Act, a carrier may not make operating changes not barred by existing agreements.

Petitioner Shore Line has cited a number of lower federal court decisions where the claimed conflict with the decision below is similarly without merit when the facts and actual holdings of the courts are examined.

Thus, *Hilbert* v. *Pennsylvania R. Co.*, 290 F. (2d) 881 (C.A. 7, 1961), and *Rutland Ry. Corp.* v. *Brotherhood of*

Locomotive Eng., 307 F. (2d) 21 (C.A. 2, 1962), involved minor as well as major disputes. They involved Section 6 notices served by the carrier, not the union, and the changes in working conditions were put into effect by the carriers under a claim that they were permitted under existing agreements, thus creating minor disputes for the National Railroad Adjustment Board. In *Illinois Central R. Co.* v. *Brotherhood of Railroad Train.*, 398 F. (2d) 973 (C.A. 7, 1968), it appears from the *per curiam* opinion of the Court of Appeals that the end product of the litigation was a remand of the case to the District Court for entry of an appropriate *status quo* order preserving established practices which a statutory arbitration board, Public Law Board No. 79, had found, during the pendency of the appeal, to be as contended by the Brotherhood. And the case of *Southern Ry. Co.* v. *Brotherhood of Locomotive Firemen, etc.*, 337 F. (2d) 127 (C.A.D.C. 1964), like the *Hilbert* and *Rutland* cases, involved a Section 6 notice by the carrier, and an injunction requiring the carrier to maintain the *status quo* alternatively until the major disputes procedures had been exhausted, or until an award of the National Railroad Adjustment Board might establish, by interpretation of existing agreements, that the carrier could have put the operating changes into effect without seeking amendment of its agreements under Section 6. Again, the case does not hold that a carrier may make unilateral changes in the subject matter of pending negotiation or mediation on a union's Section 6 notice. Finally, the case of *Norfolk & P.B.L.R. Co.* v. *Brotherhood of Rail. Train.*, 248 F. (2d) 34 (C.A. 4, 1957), is not in point. It involved a dispute jurisdiction of which had been refused by the Mediation Board, and simply held that it was unlawful for the Brotherhood to strike over what was held to be a minor dispute.

The unreported District Court opinions reproduced in the appendix to Shore Line's petition are similarly unpersuasive because of the factual situation and actual holdings involved.

The statement contained in a series of reports[8/] of the National Mediation Board, quoted in the Shore Line's brief (pp. 15-16) patently misstates the actual *status quo* provisions of Section 6 of the Act, gratuitously reading into the statute the limiting phrase "as expressed in agreements" to describe those rates of pay, rules or working conditions which the carriers are prohibited from altering. No such phrase appears in Section 6. Moreover, the statement was not made in connection with any adversary proceeding before the Board, cited no authority, and amounts to no more than a conclusion on an aspect of the Railway Labor Act over which the Board possesses no adjudicatory authority. The courts, and not the Mediation Board, are the tribunals charged with the responsibility of enforcing the commands of the Railway Labor Act. The only fact-finding powers of the Board lie in the area of representation disputes. With respect to those portions of the Act dealing with major disputes, and embodying the *status quo* provisions, its functions are mediatory and non-decisional.

The courts have recognized and enforced the Act's *status quo* requirements against carriers as well as their employees, and have not limited their scope to the narrow confines of existing agreements. Such was the clear intention of the framers of the statute, whose concern was to convince Congress that the statutory scheme of settling

---

8/ The Board's reports cited at page 16 of Shore Line's brief have simply reiterated, as matter of routine, the same statement.

major disputes by purely voluntary measures still afforded ample protection to the public, by use of the broadest possible *status quo* provisions.

4. The decision below gives effect to the Railway Labor Act's primary purpose of avoiding interruptions to commerce by placing upon management and labor alike conditions to be observed in the voluntary settlement of their disputes.

It is a well known fact that precipitous changes made by management in rules of employment or working conditions are frequently the cause of serious disputes between labor and management, and lead to strike threats and strike action. An interpretation of the Act which prevents management from changing an existing employment rule, condition or practice when such rule, condition or practice is currently the subject of collective bargaining, is essential to promote and achieve the ultimate purpose that the Congress sought to achieve when it enacted the Railway Labor Act..

The *status quo* provisions of the Act, in Sections 5, 6 and 10, are the means chosen by Congress for this objective, and it intended them to be broad in scope. When the Act's machinery for the handling of major disputes is set in motion by the service of a Section 6 notice, the carrier may not proceed forthwith to make the very change in working conditions that the union is seeking to prohibit or restrict, while at the same time requiring the union to stay its hand for the statutory period.

The incentive to make the collective bargaining process effective will in large part be thwarted if the carrier can

"jump the gun", and take the very action that a union's Section 6 notice proposes that the carrier not take, or take only when accompanied by the observance of certain conditions. Such action by a carrier would clearly signal its lack of any intention to bargain seriously about whether it would enter into an agreement not to make the involved change in working conditions. And it would be obvious to the union that it was not going to achieve its objectives without a strike to force the carrier to undo what was already done, and that the Act's mandatory major disputes procedures simply consisted of "going through the motions" in order to mature the right to strike.

The Shore Line argues (Br., p. 41) that the decision below will interfere with and delay the institution of operational changes to promote efficiency in the railroad industry. This argument comes with ill grace from this petitioner. Its right to make the changes in question was fully matured upon the processing to a conclusion of BLF&E's first Section 6 notice. But the union's right to use self-help had also matured, so Shore Line announced abandonment of its intentions to start assignments out of Trenton, and subsequently established assignments at Dearoad, asserting that this move was not within the compass of the matured dispute. BLF&E, having withdrawn its original Section 6 notice, was forced to file a new one when Shore Line again moved to establish assignments operating out of Trenton. (Statement of the Case, supra.)

But perhaps the best answer to Shore Line's concern about delayed operating efficienciec is expressed in the following language from this Court's opinion in the case of *Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U.S. 330 (1960):

> "... In other legislation, however, like the Railway Labor and Norris-LaGuardia Acts, Congress has acted on the assumption that collective bargaining by employees will also foster an efficient national railroad service. It passed such Acts with knowledge that collective bargaining might sometimes increase the expense of railroad operations because of increased wages and better working conditions. It goes without saying, therefore, that added railroad expenditures for employees cannot always be classified as 'wasteful.' It may be, as some people think, that Congress was unwise in curtailing the jurisdiction of federal courts in railroad disputes as it did in the Norris-LaGuardia Act. Arguments have even been presented here pointing to the financial debilitation of the respondent Chicago & North Western Railroad and to the absolute necessity for the abandonment of railroad stations. These arguments, however, are addressed to the wrong forum. If the scope of the Norris-LaGuardia Act is to be cut down in order to prevent 'waste' by the railroads, Congress should be the body to do so. Such action is beyond the judicial province and we decline to take it." (362 U.S. p. 342.)

The decision below does not, as Shore Line argues, operate to "destroy existing rights", unless it be said that the Railway Labor Act does this by imposing the manda-

tory duty to bargain collectively, subject to "cooling off" periods, which Congress has seen fit to impose on management and labor alike. What is involved here is merely postponement of action which a carrier wishes to take, in order to permit completion of the procedures which Congress has said must be followed in major disputes in the railroad industry. Upon completion of these procedures without agreement having been reached, either party is of course free to act unilaterally.

5. The decision below may be sustained as a proper exercise of injunctive power to enforce the duty of good faith bargaining, and of equitable discretion to protect the jurisdiction of a statutory administrative tribunal.

The decision below may also be sustained for reasons apart from the express *status quo* requirements of the Act. It is, of course, well established that grounds not considered by a lower court may be urged on appeal for the purpose of seeking affirmance of the judgment appealed from. *Langnes* v. *Green*, 282 U.S. 531 (1931; *LeTulle* v. *Scofield*, 308 U.S. 415 (1940).

This Court has squarely held that the duty to bargain collectively carries with it the requirement to refrain from unilateral action, during the bargaining process, with respect to the subject matter being negotiated. In *N.L.R.B.* v. *Katz*, 369 U.S. 736, 743 (1962), the Court said:

> " . . . We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation

> of Section 8 (a) (5), for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8 (a) (5) much as does a flat refusal."

To similar effect is the Court's decision in *Fibreboard Corp.* v. *NLRB*, 379 U.S. 203 (1966), sustaining an order of the National Labor Relations Board " . . . restoring the status quo ante to insure meaningful bargaining . . . "(379 U.S. at p. 216).

That the Railway Labor Act's commands with respect to the duty to bargain collectively will be enforced by injunctive decree is well settled. *Virginian Railway* v. *System Federation No.* 40, 300 U.S. 515 (1937). The duty to bargain aspect of this case is thoroughly discussed in the brief filed by the Railway Labor Executives' Association, and will not be elaborated here.

The opinion of the District Court, adopted by the Court of Appeals below on the *status quo* issue (A. 168), justified its ruling on the ground, among others, that the jurisdiction of the National Mediation Board should be protected by the application of the *status quo* provisions of the Act whenever it was mediating a dispute (A. 162). The reports of the National Mediation Board certainly carry no implication that its effective handling of a major dispute would not be aided by the maintenance of the *status quo*, or that it would not be hampered by unilateral action with respect to the very subject matter of the dispute which it was attempting to mediate.

Even in minor disputes this Court has upheld the issuance of injunctions to preserve the *status quo* to protect the jurisdiction of the administrative tribunal. *Brotherhood of L.E.* v. *Missouri-Kansas-T R. Co.*, 363 U.S. 528

(1960), p. 534-535; *Brotherhood of R. T.* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957). (Compare *Manion* v. *Kansas City Terminal Railway Co.*, 353 U.S. 927 (1957), where the Court vacated an injunction because the dispute was not pending before the National Railroad Adjustment Board.) The Court's reasoning on this point and balancing of the equities as set forth in its opinion in the *M.K.T.* case, supra, at 363 U.S., pp. 534-535, could aptly be applied to the facts and circumstances here.

Just as it would operate to destroy effective collective bargaining, unilateral carrier action on the subject matter of a dispute in mediation would reduce the functions of the National Mediation Board to a process of merely going through the motions preparatory to a legal exercise of the right to strike, and destroy the protection which Congress intended to afford the public when it adopted the *status quo* and cooling off provisions of the Act.

CONCLUSION

For the foregoing reasons it is submitted that the decision of the court below was correct and should be affirmed.

Respectfully submitted,

CLARENCE M. MULHOLLAND
RICHARD R. LYMAN
741 National Bank Building
Toledo, Ohio 43604

MULHOLLAND, HICKEY & LYMAN
741 National Bank Building
Toledo, Ohio 43604

Of Counsel for Respondents

ROBERT HART
15401 Detroit Avenue
Cleveland, Ohio 44107

Attorneys for Respondents